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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 41431
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR 2013-3510
v.)	
)	
JUSTIN LEE PEDERSEN,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

COPY

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE MELISSA MOODY
District Judge

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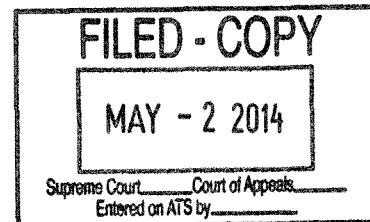


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STATEMENT OF THE CASE

Nature of the Case

Justin Lee Pedersen entered a conditional guilty plea to one count of possession of a controlled substance, preserving his right to appeal the denial of his motion to suppress. He appeals from the district court's Judgment of Conviction.

Mr. Pedersen asserts that his right to be free from unreasonable searches and seizures, protected by the Fourth and Fourteenth Amendments to the United States Constitution and Article I § 17 of the Idaho Constitution, was violated because law enforcement officers conducted a search of a jacket¹ without a warrant and in the absence of any valid exceptions to the warrant requirement. Specifically, his rights under the Idaho Constitution and the Fourth Amendment to the United States Constitution were violated when his jacket was searched incident to his arrest.

Prior to the search, Mr. Pedersen was handcuffed and secured away from the jacket and, therefore, it was unreasonable to believe that he had access to the jacket or its contents. Accordingly, Mr. Pedersen asserts that the State failed to meet its burden of proving that the search of his jacket fell within an exception to the warrant requirement and the district court erred when it denied his motion to suppress.

¹ The item of clothing was described as a grey, hooded, zip-up sweatshirt. (Tr., p.17, L.24 – p.18, L.1.) The district court and counsel consistently referred to the sweatshirt as a "jacket," thus all references contained herein will be to Mr. Pedersen's jacket. (See Tr., p.17, L.20, p.79, L.14.)

Statement of the Facts and Course of Proceedings

On March 14, 2013, at around 5 o'clock in the afternoon, Justin Pedersen arrived home. (Tr.,² p.7, Ls.8-25, p.8, Ls.22-25.) As he pulled up to his home, he saw several cars parked alongside both sides of the road by his home, and he realized that they were police vehicles and there were police officers all about his property—in his driveway and in his yard.³ (Tr., p.9, Ls.7-21.) Immediately after he pulled up to the house, an officer asked Mr. Pedersen for his identification.⁴ (Tr., p.15, Ls.15-23.) After Mr. Pedersen told the officer his name, the officer walked away to contact dispatch. (Tr., p.15, L.19 – p.16, L.4, p.28, Ls.15-22, p.44, Ls.18-24.) While the officer was away, Mr. Pedersen took off his gloves and his jacket, and took any items he had in his pockets and gave all of the clothing and items to one of his roommates, Colleen Nucho. (Tr., p.17, Ls.6-14, p.24, Ls.1-4.) Ms. Nucho was seated in a lawn chair on the front porch of the home. (Tr., p.14, L.20, p.32, L.25 – p.33, L.3.) Thereafter Mr. Pedersen took a seat on a railroad tie, smoked a cigarette, and waited for the officer to finish running his information through dispatch. (Tr., p.18, Ls.5-9.) Mr. Pedersen was seated approximately ten to 15 feet from Ms. Nucho. (Tr., p.18, Ls.15-18.) When the officer returned to where Mr. Pedersen was sitting, he told Mr. Pedersen he was under arrest for an outstanding warrant and handcuffed him.⁵ (Tr., p.18, L.21 – p.19, L.17.) After

² All references to “Tr.” are to the transcript of the suppression hearing held on June 24, 2013.

³ Mr. Pedersen later learned that the officers and detectives were there to investigate a report of a stolen generator being advertised for sale on Craigslist. (Tr., p.41, Ls.3-17.)

⁴ As Mr. Pedersen pulled up to the home, a female had identified him as the person who gave her the generator to sell. (Tr., p.42, Ls.11-20.)

⁵ Although the State failed offer any evidence of Mr. Pedersen's arrest warrant, apparently Mr. Pedersen had an outstanding warrant for a misdemeanor probation violation in Ada County Case No. 2013-2076. (Idaho Supreme Court Data Repository.)

handcuffing Mr. Pedersen, the officer asked another officer to get Mr. Pedersen's jacket and the other items from Ms. Nucho.⁶ (Tr., p.51, Ls.11-20.) A search of the jacket revealed a crystal substance which was later determined to be methamphetamine. (Tr., p.67, Ls.13-21, p.78, Ls.9-11.)

On April 19, 2013, an Information was filed charging Mr. Pedersen with possession of a controlled substance, methamphetamine. (R., pp.42-43.) Shortly thereafter, Mr. Pedersen filed a Motion to Suppress and Memorandum in Support requesting that the district court suppress "all evidence obtained as a result of an illegal search" in violation of Mr. Pedersen's rights under Article I, Sections 13 and 17 of the Idaho Constitution, and under the Fourth and Fourteenth Amendments of the United States Constitution. (R., pp.53-54, 57-61.) Mr. Pedersen asserted that the search was not a valid search incident to arrest because the search was not justified by officer safety and the jacket and its contents were not in danger of being destroyed. (R., pp.57-60.)

At the hearing on the suppression motion, the defense called Mr. Pedersen. (Tr., p.5, Ls.18-24.) Mr. Pedersen testified that when he arrived home around 5 o'clock in the afternoon, he saw several cars on both sides of the road and several police officers. (Tr., p.7, L.17 – p.11, L.7.) Mr. Pedersen testified that he was riding his motorcycle when he arrived at his home, and he was wearing gloves because it was a little chilly that day. (Tr., p.9, Ls.1-3, p.17, Ls.6-9.) He got off of his motorcycle, and an

⁶ Officer Jagosh testified that he asked Detective Scully to get the jacket and items from Ms. Nucho after Officer Jagosh had handcuffed Mr. Pedersen and while he was searching Mr. Pedersen. (Tr., p.51, Ls.11-20.) Mr. Pedersen testified that Officer Jagosh asked Detective Scully to get the items from Ms. Nucho after he was handcuffed and while he was being led to the patrol car. (Tr., p.19, L.18 – p.20, L.2.)

officer approached him and obtained Mr. Pedersen's information. (Tr., p.15, Ls.15-23.) Mr. Pedersen took off his gloves and handed the gloves, his jacket, his iPod, a Buck knife, his cell phone, and his wallet to one of his roommates, Colleen Nucho, who was sitting in a lawn chair by the front door of his home.⁷ (Tr., p.8, Ls.1-3, p.11, Ls.15-20, p.17, Ls.1-14.) Mr. Pedersen then walked back toward his motorcycle, sat down on a railroad tie, and smoked a cigarette. (Tr., p.18, Ls.5-20.) At that time Mr. Pedersen estimated he was approximately ten to fifteen feet away from Ms. Nucho. (Tr., p.18, Ls.15-20.) When the officer who had obtained Mr. Pedersen's information returned to contact Mr. Pedersen, he told Mr. Pedersen to "[s]tand up and put your hands behind your back" and then handcuffed Mr. Pedersen. (Tr., p.19, Ls.3-17.) The officer told Mr. Pedersen that there was a warrant for his arrest. (Tr., p.19, Ls.7-10.) As Mr. Pedersen was being walked to the police car in handcuffs, the arresting officer told another officer to get Mr. Pedersen's belongings from Ms. Nucho. (Tr., p.19, L.18 – p.20, L.2.)

The State called Officer Jagosh to testify. (Tr., p.38, Ls.14-23.) Officer Jagosh testified that he was on duty on March 14, 2013, and that he was at a residence investigating a missing generator. (Tr., p.40, L.20 – p.41, L.7.) As Mr. Pedersen arrived home, one of the females talking to a detective identified Mr. Pedersen as the person who gave her the generator to sell. (Tr., p.42, Ls.6-20.) The officer observed Mr. Pedersen pull into the driveway of the residence, made contact with him, and ran

⁷ On cross-examination, Mr. Pedersen said that he knew there was a warrant for his arrest and he would be arrested, so he handed his belongings over to Ms. Nucho. (Tr., p.29, Ls.14-22.)

his information through dispatch.⁸ (Tr., p.44, Ls.4-21.) When he obtained the results, he stepped away from the area in which Mr. Pedersen was standing, but continued to watch him. (Tr., p.45, Ls.8-24.) The officer saw Mr. Pedersen take off his jacket and hand his jacket and his property to the woman seated on a lawn chair by the front door. (Tr., p.46, L.12 – p.47, L.20.) After Officer Jagosh learned that there was a warrant for Mr. Pedersen's arrest, he detained and arrested him. (Tr., p.50, L.13 – p.51, L.17.) Officer Jagosh testified that Mr. Pedersen was around 15 feet from Ms. Nucho when he handcuffed Mr. Pedersen. (Tr., p.50, L.22 – p.51, L.1.) After handcuffing Mr. Pedersen, Officer Jagosh instructed another officer, Detective Scally, to retrieve Mr. Pedersen's belongings from the woman on the porch. (Tr., p.51, Ls.15 – p.52, L.5.) Officer Jagosh testified that he didn't know what was in the pockets of the jacket and there could have been a weapon or evidence, although he did not elaborate on what type of "evidence" he thought could be contained in Mr. Pedersen's jacket.⁹ (Tr., p.53, L.22 – p.54, L.2.) The officer also testified that the purchase of something off of craigslist is "quite a big operation" and it called for "quite a few [officers]." (Tr., p.55, L.24 – p.56, L.4.) He testified that the ratio of officers versus non-officers was "roughly the same." (Tr., p.52, Ls.17 – p.53, L.7.)

Detective Scally testified that Ms. Nucho was sitting on the jacket when he went to retrieve it. (Tr., p.66, Ls.16-19.) Detective Scally testified that Ms. Nucho was ten to

⁸ The record on appeal is devoid of any indication that Mr. Pedersen was involved any further in the stolen generator investigation.

⁹ Officer Jagosh testified, "So, you know, it's a sweatshirt. I didn't know what was in the pockets. While I'm handcuffing him, I don't know – I didn't know what it was. There could have been a weapon. There could have been evidence." (Tr., p.53, L.23 – p.54, L.2.)

twenty feet away from where Mr. Pedersen was being handcuffed. (Tr., p.66, L.23 – p.67, L.3.) While Mr. Pedersen was in custody, Detective Scally searched the jacket and discovered a crystal substance, later identified as methamphetamine, in a pocket of the jacket. (Tr., p.67, Ls.10-17.)

At the hearing on Mr. Pedersen's motion to suppress, the defense and the State both presented argument based on the decisions in *State v. Bowman*, 134 Idaho 176 (Ct. App. 2000) and *State v. LaMay*, 104 Idaho 835 (2004). (Tr., p.68, L.8 – p.74, L.2.) The State stipulated that Mr. Pedersen was handcuffed or restrained at the time the jacket was searched. (Tr., p.72, Ls.13-14.) The district court made the following factual findings:

1. At around 5:00 p.m. on March 14, 2013, officers went to a home in Garden City because they were investigating a report of a stolen generator;
2. In front of the home were: Colleen, Lisa, Donna, the defendant, and an unknown male. There was an unidentified female inside the home;
3. There were six officers at the scene. Two of the officers were in the backyard with the unidentified male;
4. The defendant arrived at the home on his motorcycle and pulled in next to a Subaru car;
5. One detective approached the defendant and questioned him;
6. The defendant asked to use the bathroom, which he was not permitted to do;
7. Detective Jagosh ran the defendant's information in search of warrants while the defendant waited in front of the house;
8. While the defendant was waiting, he handed his gloves, his iPod, his knife, his wallet, and his cell phone to Colleen who was sitting on the steps next to the front of the house;
9. The defendant knew that he had an outstanding warrant;

10. Before the defendant handed the items to Colleen, Detective Jagosh instructed him to remain seated where he was, and the defendant specifically disregarded or disobeyed that instruction in getting up and moving over to where Colleen was;
11. Defendant testified that it was chilly that evening in March. Colleen was located ten to 15 feet away from the defendant, and there was no one in between Colleen and the defendant;
12. The defendant was arrested for an outstanding warrant and placed in handcuffs;
13. The unidentified male in the back yard was “bigger and kind of intimidating;”
14. The police searched Mr. Pedersen’s jacket and claimed that methamphetamine was found in the jacket;
15. There was a female inside the house who refused to come out;
16. One of the officers was talking to one of the civilians to the left side of the home.

(Tr., p.75, L.10 – p.81, L.18.)¹⁰ The district court noted that the only question before it, as the defendant did not contest the stop, is whether the search of the defendant’s jacket was a valid search incident to arrest. (Tr., p.79, Ls.10-15.) The district court relied on *State v. Bowman*, a case in which the Idaho Court of Appeals discussed the two rationales for the “search incident to arrest” exception to the warrant requirement: (1) to protect an officer and other persons from dangerous objects or weapons, and (2) to prevent the concealment or destruction of evidence within the reach of the arrestee. (Tr., p.79, Ls.15-22.) The district court found that the issue which it must determine was whether the jacket that was searched was “within the immediate control of the arrestee.” (Tr., p.79, Ls.23-25.) The district court noted that the facts it must look at include: (1)

the distance between the arrestee and the place searched; (2) whether the arrestee is handcuffed and otherwise detained; (3) whether police were positioned so as to block the arrestee from the area search; and (5) the number of officers versus the number of companions of the arrestee. (Tr., p.79, L.25 – p.80, L.21.) The district court concluded that, although there was a one-to-one ratio of officers to civilians, there was risk to the officers and risk that evidence could be concealed or destroyed such that the search of Mr. Pedersen's jacket was appropriate as a search incident to arrest, and denied the motion to suppress. (Tr., p.81, L.24 – p.82, L.7.) The district court then issued an Order Denying Motion to Suppress Evidence. (R., pp.74-75.)

Following the denial of his suppression motion, Mr. Pedersen entered a conditional guilty plea to possession of a controlled substance, reserving the right to appeal the suppression issue. (R., pp.86-89.) As part of the plea agreement, the State agreed not to file a persistent violator enhancement in another case. (R., pp.86, 89.) On September 13, 2013, Mr. Pedersen was sentenced to a unified sentence of seven years, with two years fixed, and the district court retained jurisdiction.¹¹ (R., pp.90-94.) On September 18, 2013, Mr. Pedersen filed a Notice of Appeal. (R., pp.96-99.)

¹⁰ The district court provided these findings of fact in several paragraphs. These findings have been presented as individually numbered findings herein for ease of reading.

¹¹ As of May 2, 2014, Mr. Pedersen was still on the rider. (Idaho Supreme Court Data Repository.)

ISSUE

Did the district court err when it denied Mr. Pedersen's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Pedersen's Motion To Suppress

A. Introduction

Mr. Pedersen asserts that his right to be free from unreasonable searches protected by Article I, § 17 of the Idaho Constitution and the Fourth Amendment to the United States Constitution was violated when officers conducted a warrantless search of his jacket. The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV; Idaho Const. Art. I, § 17. The purpose of these constitutional rights is to “impose a standard of reasonableness upon the exercise of discretion by governmental agents and thereby safeguard an individual’s privacy and security against arbitrary invasions.” *State v. Maddox*, 137 Idaho 821, 824 (Ct. App. 2002) (citing *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979)). The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures, and warrantless searches are presumptively unreasonable. See, e.g., *State v. LaMay*, 140 Idaho 835, 837-838 (2004). The State may overcome the presumption of unreasonableness by demonstrating that the warrantless search fell within a well-recognized exception to the warrant requirement. *LaMay*, 140 Idaho at 838. If the State fails to meet this burden, the evidence acquired as a result of the illegal search, including later-discovered evidence derived from the original illegal search, is inadmissible in court. *State v. Brauch*, 133 Idaho 215, 219 (1999); *Segura v. United States*, 468 U.S. 796, 804 (1984). *Illinois v. Krull*, 480 U.S. 340, 347 (1987).

B. Standard Of Review

The standard of review of a district court's determination on a motion to suppress the State's evidence is bifurcated. See, e.g., *State v. Wiloughby*, 147 Idaho 482, 485 (2009). The reviewing Court defers to any factual findings of the district court that are not clearly erroneous. *Id.* However, the reviewing Court reviews *de novo* the district court's application of constitutional principles to the facts that are found. *Id.* at 485-486.

C. The District Court Erred When It Denied Mr. Pedersen's Motion To Suppress Because Mr. Pedersen's Jacket Was Not In The Area Of His Immediate Control

In the present case, because this was a warrantless search, the State bore the burden of proving that the search fell within a well-recognized exception to the warrant requirement. The only exception proffered by the State was the search incident to arrest exception; however, that exception is inapplicable based on the facts of this case. Thus, officers searched Mr. Pedersen's jacket without a valid exception to the warrant requirement, where the jacket was not within the area of "immediate control" of Mr. Pedersen under *Chimel v. California*, 395 U.S. 752, 763 (1969). Mr. Pedersen asserts that the search was an illegal search incident to arrest because the search was not justified by officer safety and Mr. Pedersen was being arrested on an outstanding warrant, for which no evidence of the arresting offense could be located within the jacket. As such, the district court erred when it denied his motion to suppress.

1. Police May Only Search The Arrestee's Person and The Area Within His Immediate Control As Part Of A Search Incident To Arrest

A search incident to arrest permits police to search an arrestee following a lawful custodial arrest and is premised upon the dual purposes of (1) protecting the officer and

other persons in the vicinity from any dangerous objects or weapons in the possession of the person arrested; and (2) preventing concealment or destruction of evidence within the reach of the arrestee. *LaMay*, 140 Idaho at 838 (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)). *Chimel* limited the scope of the search to “the arrestee’s person and the area ‘within his immediate control,’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”¹² *Chimel*, 395 U.S. at 763. The Idaho Supreme Court applied the *Chimel* standard and recognized the following factors in determining what is reasonably within an arrestee’s area of immediate control: (1) the distance between the arrestee and the place searched; (2) whether the arrestee was handcuffed or otherwise restrained; (3) whether police were positioned so as to block the arrestee from the area searched; (4) the ease of access to the area itself; and (5) the number of officers. *LaMay*, 140 Idaho at 838. What constitutes the “area of immediate control” is determined based on the objective facts of each case. *Id.* However, “a warrantless search must be ‘strictly circumscribed

¹² The *Chimel* Court further elaborated on the justifications underlying the rule allowing contemporaneous searches through a discussion of the decision in *Sibron v. New York*, 392 U.S. 40 (1968):

Peters involved a search that we upheld as incident to a proper arrest. We sustained the search, however, only because its scope had been “reasonably limited” by the “need to seize weapons” and “to prevent the destruction of evidence,” to which Preston had referred. We emphasized that the arresting officer “did not engage in an unrestrained and thorough going examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons.”

Chimel, 395 U.S. at 764 (1969) (quoting *Sibron*, 392 U.S. at 67) (holding that the incident search was justified “by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime”).

by the exigencies which justify its initiation.” *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

2. Mr. Pedersen’s Jacket Was Not Within The Area Of “Immediate Control” At The Time The Jacket Was Searched, And Thus The Search Of The Jacket Does Not Fall Within The “Search Incident To Arrest” Exception To The Warrant Requirement

The jacket was not within the area of “immediate control” of Mr. Pedersen as he was ten to fifteen feet away, the jacket was being sat on by Ms. Nucho, and Mr. Pedersen was handcuffed and in the presence and control of Officer Jagosh. The scope of the area of “immediate control” under *Chimel* is a radius that is to be objectively determined by the district court, based on the facts of each case. *Scott v. United States*, 436 U.S. 128 (1978).

The application of *Chimel* was recently analyzed by the Idaho Supreme Court in *State v. Frederick*, 149 Idaho 509 (2010). *Frederick*, while not directly on point because it involved the search of a vehicle incident to arrest, was a case in which the Court analyzed cases dealing with searches of vehicles incident to arrest of recent occupants. *Id.* at 511-515. The *Frederick* Court recognized that the search incident to arrest exception to the warrant requirement is not, and has never been, broad. *Id.* (holding that search of vehicle incident to suspect’s arrest on outstanding warrant was unreasonable where suspect was handcuffed and in the back of a patrol car and vehicle could not possibly contain evidence of crime of arrest).

After the suppression hearing, the district court made the following oral conclusions of law:

The only question before this court – reiterating that the defendant is not contesting the stop in this case, the only question before the Court is

whether this search of the defendant's jacket was a valid search incident to arrest. And I – both parties have cited at length the State v. Bowman case, where our Court of Appeals discussed the two rationales for the exception to the warrant requirement, first to protect an officer and other persons from dangerous objects or weapons, and second is to prevent the concealment or destruction of evidence within the reach of the arrestee.

So I must determine whether the jacket that was searched in this case was within the immediate control of the arrestee. In making that determination, the facts the Court of Appeals tells me I must look at includes: The distance between the arrestee and the place searched. That distance, as I said, was ten to 15 feet; second, whether the arrestee is handcuffed and otherwise detained. He was handcuffed at the time that the search took place; third, whether police were positioned so as to block the arrestee from the area search. The police were not positioned so as to stop or block the arrestee from the area search; fourth, ease of access to the area itself.

I've looked at State's Exhibit Nos. 1 through 4. And it's clear from looking at the photographs that the distance between where Colleen was seated and the defendant was seated on those railroad ties was quite short. It could have been covered in a matter of steps. So on that fourth factor there was a great ease of access to the area itself.

And, finally, the number of officers versus the number of companions of the arrestee. I think this is the factor that the parties have argued the most. And I don't know that this – on the facts of this case, that there's a magic number that controls the outcome.

And I think, frankly, I can go through the officers that were there, versus the – we have called them civilians that were there: One, two, three, four, five, six, seven civilians; one, two, three, four, five, six officers. So we are at about a one-to-one ratio.

But that's not really controlling in this case, from my perspective, because this is not a controlled situation. This is a moving-parts situation. It's not a situation where everybody is in one place. You have people that are in the backyard.....

...

There was also testimony that a Garden City officer – and I'll make this as a factual finding – pulled one of the civilians to the left side of the home. So we have a number of locations that are uncontrolled by these officers. And, frankly, even if there were eight officers to five civilians, even if they had outnumbered them, I can't say, given the moving parts and, frankly, the volatility of the situation, that the officers could be safe.

I think that there was risk to the officers. And I think that the second prong, as far as the concealment or destruction of the evidence, also supports a finding that it was an appropriate search incident to arrest.

So, on all of that, I conclude that it was a valid search incident to arrest, appropriate exception to the warrant requirement. And I deny the defendant's motion to suppress.

(Tr., p.79, L.10 – p.82, L.7.)

In this case, Mr. Pedersen arrived at his house and spoke to Officer Jagosh. (Tr., p.42, Ls.16-25, p.44, Ls.4-21.) While Officer Jagosh ran his information, Mr. Pedersen emptied his pockets of valuable such as his wallet and cell phone and took off his jacket.¹³ (Tr., p.46, L.12 – p.47, L.20.) He gave all of the items to Ms. Nucho who was seated on a chair by the front door. (Tr., p.46, L.12 – p.47, L.20, p.49, Ls.8-11.) At some point she was sitting on all or part of the jacket. (Tr., p.66, Ls.16-19.) Officer Jagosh then placed Mr. Pedersen under arrest by putting him in handcuffs, after which asked another officer to retrieve the jacket and other items from Ms. Nucho. (Tr., p.50, L.13– p.52, L.5, p.59, Ls.16-23.) Officer Jagosh testified that Mr. Pedersen was around 15 feet from Ms. Nucho when he handcuffed Mr. Pedersen. (Tr., p.50, L.22 – p.51, L.1, p.59, Ls.11-15.)

¹³ At the suppression hearing, Mr. Pedersen testified that, amongst his belongings, there was a "buck knife." (Tr., p.17, L.10.) No additional testimony was adduced regarding the "buck knife" and none of the officers testified that they feared for their safety due to the presence of a "buck knife." Further, the State conceded during argument at the suppression hearing that "there wasn't a weapon . . . he could have used." (Tr., p.74, Ls.8-10.) This fact can be likened to the presence of the pizza-cutting knife in the hotel room in *LaMay*. See *LaMay*, 140 Idaho at 452 (finding that the knife which was used to cut pizza, and which was placed in a drawer by the officers, was an irrelevancy in the Court's analysis as the officers had no fear of it as a weapon); see also *State v. Henage*, 143 Idaho 655 (2007) (holding that, even though the suspect admitted to having a knife on his person, the officer did not identify any fact that demonstrated the suspect presented a potential threat, and therefore, the search was not justified under Terry).

Officer Jagosh testified at the suppression hearing that Mr. Pedersen took off the jacket and handed the items to Ms. Nucho while he was running Mr. Pedersen's information through dispatch. (Tr., p.58, Ls.7-20.) The jacket was not retrieved and searched until after Mr. Pedersen was handcuffed. (Tr., p.51, Ls.15-20.)

The district court erred in finding that "there was risk to the officers" and in finding that "the second prong, as far as the concealment or destruction of the evidence, also supports a finding that it was an appropriate search incident to arrest." (Tr., p.81, L.24 - p.82, L.3.)

Thus, the State did not show that at the time of Mr. Pedersen's arrest the jacket was within Mr. Pedersen's area of immediate control from which he could have drawn a weapon or attempted to conceal or destroy evidence. Mr. Pedersen was handcuffed and secured in the driveway, the jacket was being sat on by a woman near the front door of the home some ten to fifteen feet away, and Mr. Pedersen certainly could not have reached the jacket to grab a weapon or destroy evidence. Thus the district court erred in ruling that the search of the jacket was justified as a search incident to his arrest. See, e.g., *LaMay*, 140 Idaho at 839 (where defendant had been arrested, handcuffed, and placed in a hallway under guard, the search of a backpack located fifteen feet away in another room was not justified as a search incident to his arrest merely because the backpack had been in his immediate control prior to his arrest).

Here, the district court erred in finding that Mr. Pedersen was within the area of immediate control where Mr. Pedersen had been handcuffed and was in the presence of an officer and the jacket was being sat on some ten to fifteen feet away from Mr. Pedersen, and as Mr. Pedersen was being arrested on an outstanding warrant,

there was no reason to believe evidence of the crime of arrest would be found either on his person or in his personal effects. Further, the district court failed to take into consideration the fact that the officers at the residence were armed, while the civilians presumably were not. Nor was there any evidence that the civilians outside the house were uncooperative, threatening, or violent. Thus, where the basis for the warrant exception for a search incident to arrest is officer safety and to prevent destruction of evidence, neither of these excuses were applicable in this case.

3. The District Court Misapplied The Test Articulated In *LaMay* And *Bowman*

In denying Mr. Pedersen's motion to suppress, the district court erred in relying on the Idaho Court of Appeals' holding in *State v. Bowman*, 134 Idaho 176 (Ct. App. 2000). The district court relied heavily on *Bowman* in finding that Mr. Pedersen's jacket was properly searched incident to his arrest; however, *Bowman* is easily distinguishable from the facts of this case.

In *Bowman*, the Court of Appeals upheld the search of Mr. Bowman's jacket incident to his arrest after he handed the jacket to a woman a few feet away immediately prior to his arrest. *Id.* The Court found that, had there been a weapon in the coat, all of the people involved were "within the zone of activity in which it could have been used by the woman or made available to the defendant." *Id.* at 180. The Court of Appeals then reasoned that:

The potential for risk of harm to the officer on these facts was high. To allow a defendant to hand over an article of clothing just before his arrest and thereby avoid the search of said item would seriously undercut the purposes and policy behind the search incident to that arrest - ensuring the safety of officers and bystanders through the recovery of weapons within the defendant's area of immediate control and preventing the loss or destruction of evidence of criminal activity. Faced with the possibility that

the jacket might contain a weapon or evidence of a crime which could be lost or destroyed, we conclude that Wittmuss acted reasonably in requesting the jacket in order to search it incident to Bowman's arrest. We hold that such search did not violate Bowman's constitutional rights

Id. (internal citation omitted).

A search incident to arrest may extend only to “the arrestee’s person and the area ‘within his immediate control,’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *State v. Foster*, 127 Idaho 723, 728 (Ct. App 1995) (quoting *Chimel*, 395 U.S. at 763)

In attempting to carefully apply the test set forth in *Bowman* to the facts of this case, the district court neglected to appreciate the original reason behind the pertinent warrant exception—to protect officer safety and to prevent removal or destruction of the evidence of the crime. In doing so, the district court sabotaged the test by ignoring the importance of “whether the arrestee was handcuffed or otherwise restrained.” Here, the fact that Mr. Pedersen was handcuffed and in the control of an officer, when his jacket was seized and searched, is determinative of whether he had immediate control of the jacket.

In determining the area of immediate control, the *Bowman* Court used five factors identified by an outdated legal treatise as facts that had been relied on by other courts.¹⁴ 134 Idaho at 179-80. The Court found the following facts determinative: that there was one officer and three civilians, the arrestee had “hastily” removed his jacket and was left standing in a T-shirt at 4:30 a.m. in January, the distance from the arrestee to the

¹⁴ The treatise relied upon by the Court was 3 WAYNE R. LAFAVE, SEARCH & SEIZURE S 6.3(c), at 306-07 (3d ed. 1996), but this search and seizure law summary was written prior to the United States Supreme Court decisions in *Thornton* and *Gant*.

woman holding the jacket was less than fifteen feet, and the arrestee had not yet been handcuffed.¹⁵ *Bowman*, 134 Idaho at 180.

However, *Bowman* offers little guidance on the issue in the case at hand. First, *Bowman* was decided prior to the Idaho Supreme Court's decision in *LaMay* and Mr. Pedersen asserts that this case is strikingly similar to the facts of *LaMay*. Second, the case at hand is distinguishable for several reasons. Contrary to the district court's findings, Mr. Pedersen had no ability to access the jacket. He was handcuffed, approximately fifteen feet away from the jacket, and he was under the custody and control of Officer Jagosh. As such, there was no potential risk to officers from any possible weapons in the jacket unlike the parties in *Bowman*. Further, Mr. Pedersen was handcuffed at the time the jacket was retrieved and would have been unable to access the jacket or its contents such that the risk to officer safety or the risk that evidence would be destroyed would exist.

In *LaMay*, the Idaho Supreme Court held that the search of the arrestee's backpack was not a reasonable search incident to arrest. 104 Idaho at 840. In *LaMay*, three officers encountered seven people in a hotel room. *Id.* at 837. *LaMay* was brought out into a hallway, placed under arrest for an outstanding warrant, handcuffed, and required to remain seated in the hallway under the guard of one of the officers. *Id.* An officer then searched a backpack that had been located approximately 10 inches

¹⁵ The *Bowman* Opinion, a Court of Appeals decision published 14 years ago, may be a departure from established case law, as the Court appeared to broaden its analysis of the risk that the arrestee posed to the officer to include the risk that a bystander, the woman holding the coat, would locate a weapon inside the coat and potentially use it against the officer. *Id.* Such a finding would negate any justification for the search of the coat as a "search incident to arrest" under *Chimel*.

from LaMay's hand when the officers entered the room. *Id.* LaMay was approximately 15 feet away from the backpack when it was searched. *LaMay.* at 837-40. The backpack contained cocaine. *Id.* The Court found that under these facts the backpack presented "no immediate danger to the officers or others surrounding the arrest." *Id.* at 839. Nor was the backpack and its contents in danger of being destroyed. *Id.* Because LaMay's backpack was not seized during the period of time it was within his control, once the officers had secured their own safety and restrained LaMay, any justifications underlying the search incident to arrest exception ceased to exist. *Id.* at 840. The Court held that the trial court properly applied the *Chimel* test to the facts in determining that the backpack was not within LaMay's "immediate control" at the time of his arrest. *Id.* at 839.

Similarly, here, the jacket was not seized while it was within Mr. Pedersen's control when it was seized. After the officers secured their own safety and restrained Mr. Pedersen, the justifications underlying the search incident to arrest warrant exception ceased to exist. In this case, the district court's conclusion regarding fact number four, that there existed a "great ease of access to the area itself" was clearly erroneous. (Tr., p.79, L.25 – p.80, L.21.) Under these circumstances, the State failed to show that Mr. Pedersen was able to reach the jacket and access the contents of the jacket, particularly where Mr. Pedersen was handcuffed at the time, removed from the area, and under the control of Officer Jagosh. Further, Detective Scally testified that Ms. Nucho was actually sitting on the jacket thus making more remote the possibility that Mr. Pedersen could, while guarded and handcuffed and some ten to fifteen feet away, lunge to obtain an item from the jacket.

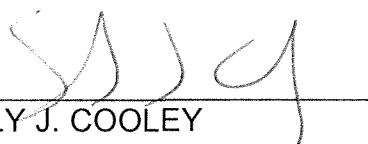
Mr. Pedersen was not an immediate threat to the officers as he was handcuffed, removed from the immediate location, and under the control of an officer. As such, the State failed to show that the jacket was within Mr. Pedersen's immediate control as required under *Chimel* in order to justify the search under the search incident to arrest exception of the warrant requirement.

The district court misapplied the considerations set forth in *Bowman*, and failed to consider the Idaho Supreme Court's decision in *LaMay* when it denied the defendant's motion to suppress.

CONCLUSION

Mr. Pedersen respectfully requests that this Court vacate the district court's order of judgment and commitment, reverse the order which denied his motion to suppress, and remand his case for further proceedings.

DATED this 2nd day of May, 2014.



SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of May, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JUSTIN LEE PEDERSEN
INMATE #65288
CAPP
15505 S PLEASANT VALLEY ROAD
KUNA ID 83634

MELISSA MOODY
DISTRICT COURT JUDGE
E-MAILED BRIEF

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SJC/eas